TAFADZWA DERICK MASAWI

versus

MASTER OF THE HIGH COURT

and

ESTATE LATE ABEL MASAWI (represented by A. CHITAUNHIKE

in his capacity as Executor Dative)

and

MUNYARADZI KAZINGIZI

and

ABIGAIL CHIPURU

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, 14 March and 17 March 2017

**Urgent Application**

*N Magumise,* for the applicant

1st respondent not in attendance

*S Chatsanga,* for the 2nd respondent

3rd respondent in person

*M L Karara,* for the 4th respondent

CHITAKUNYE J: The applicant approached this court on an urgent chamber application seeking an order that:

INTERIM RELIEF

That pending the final determination of the Applicant’s Court Application for condonation for late noting of notice for review and subsequent Application for Review -

1. The 2nd respondent be and is hereby ordered to stay disbursement of sale proceeds out of the sale of house number 8094 9th Circle, Glen View, Area 8 immediately upon service of this order.
2. The 4th respondent be and is hereby ordered to stop forthwith any occupation process of the house.

The final order sought is couched as follows:

THE TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this honourable court, why a final order should not be made in the following terms:

1. That disbursements of sale proceeds of house number 8094 9th Circle, Glen View, Area 8 be and is hereby stayed pending finalisation of condonation under case number HC2082/17 and the subsequent Application for Review.
2. The respondents to pay costs on a higher attorney-client scale.

The pertinent facts of the case were that:

At an edict meeting held on 17 March 2016 the applicant was nominated as executor dative to the estate late Mutandwa Abel Masawi who died at Harare on 10 March 2000. The applicant accepted the nomination but was not issued with letters of administration. He apparently started doing his duties as executor dative.

After receiving a complaint from one of the potential beneficiaries, on 18 August 2016 the Master held a special meeting involving beneficiaries and the nominated executor. At the end of that meeting the Master captured the resolution of the meeting in these words:

“It shows that the estate is a disputed one and there is need for appointment of a neutral executor.

Tafadzwa has applied for an eviction order against Munyaradzi; may have been unsuitable to be appointed as the executor.

* Other deceased children are out of Harare.
* I suggest we may proceed to appoint an independent executor.”

Based on this resolution A. Chitaunhike was appointed executor dative on 24August 2016 and his letters of administration were issued on 7 September 2016.

The letter advising Tokwane Consultants (A. Chitaunhike) of the appointment was copied to the applicant and the third respondent. The applicant confirmed receiving that letter in August 2016.

The independent executor proceeded to administer the estate in terms of the law. Upon failing to raise money required in the administration of the estate he opted to sell the only immovable asset available.

In that regard the applicant said he and his other siblings were only given about two months to raise the money that was required and when they could not, the executor proceeded to sell the house despite their request for an extension of time within which to raise the money. After the sale of the house occupants thereof were given three months’ notice to vacate.

It is apparently towards the end of that notice period that the applicant approached this court seeking the stay of disbursements of proceeds from that sale.

The applicant alleged that he was appointed executor dative on 17 March 2016 in the estate late Mutandwa Abel Masawi. As he was in the process of administering the estate he requested the third respondent to free one of the rooms she was occupying so that it can be leased out to raise the money that was required to pay the Master’s fees and other liabilities. The third respondent reported him to the Master who then called for the meeting on 18 August 2016.

The applicant’s complaint is that at the end of that meeting the Master purported to remove him from the office of executor without following the proper procedure for the removal of an executor. It is that decision by the Master that he wished to bring on Review once he has been granted condonation for the late noting of notice of review. He has already filed an application for condonation of the late filing of the notice of review.

It is in these circumstances that the applicant seeks the interim relief referred to above. This is basically to interdict the disbursement of proceeds of the sale till the determination of a yet to be filed Application for Review.

The first respondent submitted his report in which he essentially contends that he acted in terms of the law and that the applicant’s actions were intended to delay the due administration of the estate in question.

In that report the first respondent contended, *inter alia*, that he was entitled to act as he thinks expedient in terms of s 116 (1) of the Administration of Estates Act, [*Chapter 6:01*]. According to the first respondent, the inquiry of 18 August 2016 was in terms of s 116 of the Act and during that inquiry it was established that the applicant had failed to exercise his statutory mandate as evidenced by his intention to evict the third respondent. During that inquiry it was also established that the applicant was partisan and there was conflict of interest.

The first respondent also referred to the provisions of s 26 as empowering him to review his earlier decision and remove an executor from his office.

The second respondent also opposed the application. In opposing the application the second respondent contended that the applicant was never appointed executor. He had only been nominated. Though he had accepted the nomination he was not issued with the letters of administration. In effect therefore he was found unsuitable before the letters appointing him had been issued. As far as the second respondent is concerned in the absence of letters of administration it cannot be contended that the applicant was appointed executor. He argued that the Master acted in terms of the law in appointing him as executor. In that role he had proceeded to administer the estate and due to lack of funds, and the failure by the applicant and other potential beneficiaries to raise funds, he opted to sell the house in question.

The executor indicated that the purchaser had already paid the purchase price from which some estate liabilities have already been met. The property has in fact already been ceded into the purchaser’s name.

The third respondent’s contention was to the effect that when the house was sold she was given notice to vacate and she has done so. She was also promised to be paid her share by the 21st March. She is thus awaiting the payment of her share. Any delay in the disbursement of the proceeds will be to her prejudice.

The fourth respondent contended that the application is not urgent as the need to act arose on 18 August 2016 when the Master made the decision that the applicant wants to take on review. The applicant knew about the decision to appoint a neutral executor on that date. Thereafter he was informed about that appointment by letter dated 24 August 2016. The applicant acknowledged receiving this letter.

The fourth respondent further stated that the applicant was aware that the house was being sold. Later in January 2017 he came to know that the house had been sold. She also stated that the applicant attended meetings called by the executor at the executor’s offices.

The fourth respondent further contended that from the applicant’s application no cogent explanation was proffered for failing to act when all the steps, that he now wishes to challenge, were taken. The delay has thus not been adequately explained.

The fourth respondent also alluded to the failure to cite the Executor in his personal capacity. The party cited as the second respondent is Estate late Abel Masawi (represented by A Chitaunhike in his capacity as Executor Dative).

The executor ought to have been cited in his personal capacity as well as it is his action that is sought to be stayed.

On the merits, the fourth respondent contended that there was no merit in the condonation at all. This application is just a dilatory tactic to delay the inevitable. There were also no letters of administration showing that the applicant had been appointed executor in the estate late Abel Masawi. The annexure ‘A’ which the applicant sought to rely on was merely a nomination. Being nominated is not the same as being appointed.

From the submissions made the first aspect to determine is on urgency. The applicant’s counsel admitted that the need to act arose on 18 August 2016 when the decision the applicant wished to have reviewed was made. Due to ignorance of the steps to take on challenging that decision, the applicant did not approach court. It was only when the Master told him in February 2017 to approach the High Court that the applicant became aware of the procedure to take. It may be noted that even in his founding affidavit the applicant alluded to the issue of ignorance hence the application for condonation of the late noting of notice of review.

It is common cause that the applicant only brought this application after the sale and when the purchaser had taken cession.

The stage at which the applicant sought to stay the disbursement or, for that matter, sought to interfere with the proceedings came after he acknowledged that the executor had given them two months to raise the money required for the estate’s liabilities and they had failed to do so. The sale only took place after such failure. The application was also made towards the end of the three months’ notice period for them to vacate the house. During all this time the applicant knew the property was being administered by the executor. The question that arises is whether in the circumstances his excuse of ignorance can be sustained.

The issue of what constitutes urgency has been debated in a plethora of cases. chatikobo j in *Kuvarega* v *Registrar General & Another* 1998 (1) ZLR 188 (H) at 193F-G stated that:-

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

In elucidating the same point of what constitutes urgency makarau jp in *Document Support Centre* (*Pvt) Ltd* v *Mapuvire* 2006(2) ZLR 240(H) at 244C-E opined that:

“ In my view, urgent applications are those where if the courts fail to act, the applicant may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.”

In *casu*, it is pertinent to note that in issues of administration of Estates most self actors depend on the Master’s office for guidance. Where such guidance is not provided more often than not non professional or indigent executors or beneficiaries find themselves at cross roads with the dictates of procedural requirements. In this case, it was not disputed that the applicant approached the Master’s office complaining about his removal from the office of executor and the appointment of the neutral executor. Without guidance his explanation for ignorance as the cause for the delay should not be lightly dismissed. According to the applicant, it was only after the sale of the house that the Master advised him to approach the High Court.

Whilst generally ignorance of the law is not a defence, I cannot ignore the reality afflicting indigent persons. Now that he has approached court it would not be fair and just to deny him a hearing on the basis that he ought to have acted with speed when the need to act arose. In my view, he acted with speed when he acquired knowledge of what was expected of him.

It may also be noted that issues to do with the Administration of Estates involve family relations and emotions and such issues are best suited to be decided on the merits than on technicalities. In the circumstances I will thus lean in favour of the applicant and allow the matter to be heard on the urgent roll.

The requirements for the interdict sought include that the applicant must establish:-

1. A *prima facie* right, even if it be open to some doubt;

2. A well grounded apprehension of irreparable harm if the relief is not granted;

3. That the balance of convenience favours the granting of the interim relief.

1. *Prima facie* right

In *casu,* there is no doubt that the applicant was nominated for the office of executor dative estate late Mutandwa Abel Masawi. He duly accepted the nomination. The applicant set upon administering the estate and in the process had a disagreement with the third respondent.

The Master called for a special meeting after which he purported to withdraw the nomination of applicant which applicant had accepted. It is in this light that the applicant says he had been appointed executor.

In his report the Master confirmed as much when he alludes to having removed the applicant.

The second and fourth respondents contended that as the applicant had not yet been issued with letters of administration he cannot claim to have been appointed executor. In the circumstances any rights he may seek as executor are non-existent. The first respondent contended that he acted in terms of the law specifically ss 116 (1) and s 26 of the Act.

It is, however, my view that in as far as it was common cause that the applicant was nominated and accepted the nomination, the failure to be issued with letters of administration is not fatal to his cause. In cases of estates administered in terms of customary law, letters of administration are not required. In such cases the appointments are done in terms of s 68B of the Act. That section does not provide for the issuance of letters of administration. It would of course be a good practice for the office of the Master to issue such letters or other form of evidence of the appointment and to do so promptly upon nomination and acceptance. See *Mutyasira* v *Gonyora* SC 80/06 and *Masubey* v *The Master* HH91/93.

I am thus of the view that the applicant has established a *prima facie* right in his capacity as someone whose office of executor was revoked in a manner he wishes to take on review. It is his right to bring on review the decision by the Master. (*Malyam Matsinde* v *Patricia Nyamukapa* HH 102/06).

2. Whether applicant has established that he will suffer irreparable harm if the disbursement is finalised.

It is common cause that failure to grant the order will result in the proceeds being disbursed and the possibility of a refund should his challenge of the removal from office be successful will be remote. It may also reduce the challenge to a mere academic exercise as what he wishes to secure will be beyond his reach.

3. The balance of convenience.

Whilst inconvenience will be suffered in whichever way the matter is determined, the issue is on the balance of convenience. In as far as the applicant has already filed an application for condonation for late filing of the notice and application for review it is only fair and just that he be allowed to proceed with some hope of reviving his executorship. The other affected parties would suffer less if they were to wait for the determination of his applications. In any case as already alluded to above, issues of administration of estates involve family relations and emotions and so are best resolved by affording each member a hearing where a final and more definitive decision is made. However, should the application for Condonation fail that would be the end of the protection afforded by this order. I will thus grant the application in terms of the draft.

Accordingly the interim relief is hereby granted as follows:

That pending the final determination of the Applicant’s Court Application for condonation for late noting of notice for review HC 2082/17 and subsequent application for review:

1. The 2nd respondent be and is hereby ordered to stay disbursements of sale proceeds out of the sale of house number 8094 9th Circle, Glen View, Area 8 immediately upon service of this order.
2. The 4th respondent be and is hereby ordered to stop forthwith any occupation process of the house.

*Legal Aid Directorate*, applicant’s legal practitioners

*Chatsanga & Partners*, 2nd respondent’s legal practitioners

*Mugumeza & Mazhindu*, 4th respondent’s legal practitioners